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November 21, 1995

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

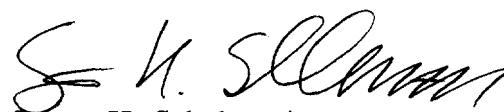
Re: Docket No. 95-59, EX PARTE PRESENTATION

Dear Mr. Caton:

Pursuant to Commission Rule 1.1206(a), 47 C.F.R. § 1.1206(a), enclosed please find two copies of the written component, with minor typographical corrections, of an oral *ex parte* presentation made November 14, 1995, to Scott Harris, Mark Grannis and Rosalee Chiara of the Commission's International Bureau on behalf of Hughes Network Systems, Inc. by James F. Rogers, Steven H. Schulman and Steven P. d'Adolf in the above-referenced rulemaking proceeding. The oral presentation addressed those matters contained in the written component.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,


Steven H. Schulman*
of LATHAM & WATKINS

Enclosure

*Admitted in Maryland only

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William F. Caton, Acting Secretary
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cc: Scott B. Harris
Mark Grannis
Rosalee Chiara



FCC Preemption of Local Satellite Antenna Regulations

Docket No. 95-59

Hughes Network Systems, Inc.
Meeting with FCC International
Bureau

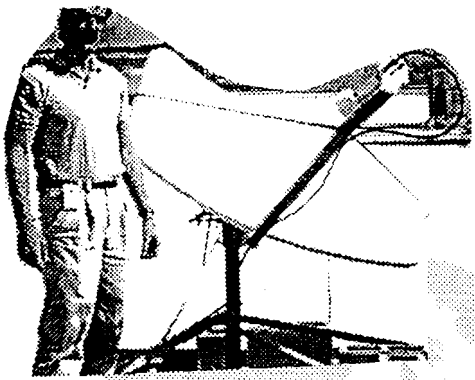
November 14, 1995

Introduction

- ◆ FCC has recognized problems with current rule
 - Local jurisdictions still imposing unreasonable requirements, preventing access and competition
 - Current rule vague -- allows too much discretion at local level

Commission seeks to eliminate uncertainty with new Section 25.104

- Eliminates “reasonableness test”
- Creates presumption & rebuttal system, allowing smaller antennas to be installed with little regulation
- Clearly defined exhaustion principles for larger antennas
- Allows waivers for unique circumstances



Hughes Network Systems

- Has been vitally interested in this issue for years; filed petition for declaratory relief in 1993
- VSATs serve as an important part of the NII/GII and as a direct competitor to PSTN-based services, allowing customers to link remote sites to a central hub and to each other
- Has installed 70,000 VSATs over past five years, totaling 228,000 antenna years
- Customers run the gamut from E.D. Jones to Ford Motor Company, Wal-Mart Stores to FLEMA, Builders Square to Amoco

Three Threats to Success of the New Rule

- ◆ Unclear rule will give municipalities limitless discretion
 - “Install first, fight later”
 - “Substantial” must be defined in concrete terms
 - Technical fixes to rule needed for clarity
- ◆ RF radiation loophole will allow unreviewable prohibitions
- ◆ Municipalities’ safety hysteria could prevent reasonable rule

Rule Must Be Clear

- ◆ Rebuttable Presumption must mean “install now, fight later”
 - Otherwise, new rule will be an empty promise, placing burden on installer/user to prove preemption
 - Bellefontaine Neighbors: forcing HNS to re-install on ground or will take Amoco station owner to court

Rule Must Be Clear

- ◆ “Substantial” -- the threshold for preemption
 - Used in Section (a) of new rule, is the “gateway” into preemption analysis
 - NPRM defined “substantial” as “not de minimis”
 - ◆ Leaves too much room for argument
 - ◆ E.g. Hamilton Township -- \$5,000 per antenna viewed as reasonable for Amoco or HNS

Rule Must Be Clear

- ◆ Must have concrete thresholds, at least for smaller antennas
 - ◆ VSATs (commercial use): substantial = \$50+ *or* more than seven days' wait *or* any meetings/hearings
 - ◆ DirecTV (consumer use): no fees, no permits, no hearings
 - ◆ Less litigation, less burden on FCC

Rule Must Be Clear

- ◆ Technical fixes to rule
 - Separate treatment of “transmitting” and “receiving” antennas in rule will lead to unjustified separate treatment in practice
 - Structure of Paragraph (a) is confusing -- not clear how decisionmaker is to weigh local objectives against federal interests

Rule Must Be Clear

- ◆ Technical fixes to rule
 - Rebuttable presumptions of Sections (b) and (c) must be self-contained (no reference back to Section (a)) -- need to include balancing of federal interest in (c)
 - Exhaustion (only relevant to larger antennas)
 - ◆ 30 days plenty of time for municipality to process application

Radio Frequency (“RF”) Radiation Regulations Must Be Preempted

- ◆ Proposed Rule places no restrictions on local regulations based on RF; a municipality could ban all transmitting antennas under terms of Proposed Section (d)

RF Radiation Regulations Must Be Preempted

- ◆ Entire rule can be eviscerated by RF regulations
 - Towns are not expert on RF, but are susceptible to unsupported fears
 - Bronxville, NY
 - ◆ Does not permit “any use which is noxious or offensive by reason of emission of . . . radiation”
 - ◆ This provision held up installation of VSAT for months; installation performed only after four presentations by HNS
 - ◆ Can’t keep flying around country to attend meetings

RF Radiation Regulations Must Be Preempted

■ Port Washington, NY

- ◆ Prohibits location of antenna within 100 feet of adjacent property
- ◆ Requires showing of “field and strength of microwave radiation hazard emanating” from the antenna

■ Even apparently reasonable RF regulations can impose excessive costs

- ◆ Measurement of RF on individualized basis is prohibitively expensive

RF Radiation Regulations Must Be Preempted

- ◆ FCC is uniquely qualified to set appropriate level of RF exposure
 - Already has: Rule 1.1307(b) adopts 1982 ANSI standards as threshold for environmental analysis; may change the rule to adopt 1992 ANSI standards (ET Docket No. 93-62).
- ◆ HNS VSATs meets ANSI standards adopted and proposed by FCC

RF Radiation Regulations Must Be Preempted

- ◆ RF exposure is an issue to be resolved nationally, not locally
- ◆ Notice has been given on this issue
 - NPRM specifically proposes to exempt “local health and safety regulations relating to radio frequency radiation”
 - Outright reversal of initial position does not violate notice requirement. *American Medical Ass’n v. United States*
 - HNS identified issue in its initial comments, giving all others opportunity to respond

VSATs are Safe

- ◆ Municipalities have created “safety issue”
 - Assert that industry is sacrificing lives for profits (see *ex parte* letters)
 - Claim that no safety regulation will be allowed
 - Focus solely on outdated C-band backyard dishes; don’t even address commercially-used VSATs and other smaller antennas

VSATs are Safe

After Hurricane Andrew hit: "It was pretty amazing. Of all our stores, not one lost an antenna from the roof, not even in 150mph winds... Power was out everywhere, but once the sites came back up, seven [out of 8 sites] responded immediately and began transmitting. The eighth one, it turned out, simply needed repointing. It was almost a miracle, because the air conditioning units right next to it had been ripped right off the roof..."

- John Wallace,
Director of Technical Support -
Builders Square

- ◆ No evidence of harm caused by antennas
 - Hurricane Andrew: no antennas lost
 - Antennas must be installed securely to ensure continuing line of sight
 - HNS VSATs installed by professionals, to withstand high winds, snow loads

VSATs are Safe

- ◆ Safety regulations can still be implemented
 - Regulation need not be more than “substantial”
 - ◆ Allows inspection
 - ◆ Allows permits
 - If narrowly tailored to meet objective, can rebut presumption